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In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES N. HAVERLY AND RUTH L. HAVERLY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Washington, D.C. 20530.

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The sole issue raised by the petition in this federal income tax case is whether the value of sample textbooks sent by publishers to petitioner [1] was includable in his gross income under Section 61 of the Internal Revenue Code of 1954, when he accepted those textbooks and exercised dominion over them by donating them to a school library and claiming a charitable deduction on account of the gift. Petitioner acknowledges (Pet. 5) that the court of appeals correctly char-

[1] "Petitioner" refers to Charles N. Haverly. Ruth L. Haverly is a party solely because she filed a joint return with her husband for the year in issue.

acterized the question as one "of first impression" (Pet. App. A10).

Petitioner was the principal of a public elementary school in Chicago, Illinois, during the years 1967 and 1968. Publishers sent petitioner unsolicited sample copies of textbooks in these years with a stipulated total fair market value of $400 at the time of receipt. The samples were provided to petitioner in order that he could examine the books and determine whether they were appropriate for use in the instructional unit for which he was responsible. The publishers did not intend the books to be compensation, nor were they gifts within the meaning of Section 102 of the Code (Pet. App. A11).

In 1968, petitioner donated the books to the library at his school. On his 1968 income tax return, he claimed a charitable deduction of $400 for the gift, but never included the value of the books in his income. The Commissioner conceded petitioner's right to a charitable deduction for the gift to the school library, but determined that the value of these books should have been included in income and assessed a deficiency accordingly.

In this suit for refund, the district court held that the value of the sample textbooks sent to petitioner was not income (Pet. App. A2 to A8). The court of appeals reversed, holding that the value of these books constituted income to petitioner under Section 61 of the Code (Pet. App. A13 to A15).

Section 61 provides that, subject to certain exceptions which are concededly not applicable here, "gross income means all income from whatever source de-

rived * * *." This Court has held that "this language was used by Congress to exert in this field 'the full measure of its taxing power,'" and thus "to tax all gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429–430; *James* v. *United States*, 366 U.S. 213, 219. In keeping with this broad statutory language, this Court has defined income under Section 61 to include all "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co., supra*, 348 U.S. at 431.[2]

Petitioner here "realized" just such an "accession to wealth" when he received the textbooks. The publishers who sent the books attached no conditions to their transfer and petitioner exercised complete dominion over these books when he transferred them to the school library.[3] Petitioner's claim of a $400 chari-

[2] Petitioner argues (Pet. 6–7) that the decision below conflicts with *Mason* v. *United States*, 513 F. 2d 25 (C.A. 7). However, *Mason* involved the different question whether the difference between the value of a business transferred to a charity and the present value of the note given by the charity as consideration for the transfer was deductible as a charitable contribution and whether the charity's subsequent payments on the note would constitute income to the transferors under certain tax benefit theories. Moreover, even if there were a conflict between *Mason* and this case, it should be resolved by the Seventh Circuit and not by this Court. *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 345 U.S. 247, 260, n. 20; *Wisniewski* v. *United States*, 353 U.S. 901, 902.

[3] Contrary to petitioners' contention (Pet. 5), the court of appeals did not hold that his claim of a charitable deduction gave rise to income. Rather, the court held (Pet. App. A13) that the claim of the charitable deduction showed that petitioner had exercised dominion over the books, and thus "realized" the income represented by their value.

table deduction for this gift shows that the court of appeals correctly concluded that the books constituted an accession to his wealth, which was includable in his gross income.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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